No. 12961

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HERSCHEL BULLEN, MARY H. BULLEN, J. C. HAYWARD and MARY S. HAYWARD,

Appellants,

vs.

ADAMANT COMPANY, WALTER B. SCOVILLE, JOE SEEPLE and HARRY WYNN; UNITED STATES OF AMERICA and RECONSTRUCTION FINANCE CORPORATION,

Appellees.

Opening Brief of Appellants Herschel Bullen, Mary H. Bullen, J. C. Hayward and Mary S. Hayward.

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Appellees.

Opening Brief of Appellants Herschel Bullen, Mary H. Bullen, J. C. Hayward and Mary S. Hayward.

Jurisdiction.

This was originally a suit by the United States to condemn land in Los Angeles, California. The statutes under which it was brought are set out in paragraph 6 of the Amended Complaint. [Tr. 5.] The District Court had jurisdiction under Title II of the Second War Powers Act of March 7, 1942, c. 199, sec. 201, 56 Stat. 176, 177, 50 U. S. C. App. sec. 632, as extended by Executive Order 9217, August 7, 1942, 7 F. R. 6177, 50 U. S. C. App. following sec. 632, and Section 1 of the General Condemnation Act of August 1, 1888, c. 728, 25 Stat. 357, 40 U. S. C., sec. 257. The judgment appealed from, which is not the original judgment in the case, was entered on October

30, 1950. [Tr. 154-156.] A motion for a new trial by the petitioners and appellants Herschel Bullen, Mary H. Bullen, his wife, J. C. Hayward and Marion S. Hayward, his wife, was denied on December 11, 1950. [Tr. 184.] A notice of appeal was filed by the appellants Bullen and Hayward on January 16, 1951. [Tr. 190-191.] This court has jurisdiction of the appeal under 28 U. S. C. A. 1291.

Statement of the Case.

A. Introductory Statement.

This part of the case involves the determination of the rights of various claimants in a fund awarded by the jury as the value of a certain oil well, which was part of the property condemned. The entire working interest in the well was valued by the jury, judgment was entered thereon, and the money was deposited in court. The judgment placing a valuation upon the oil well in question, and various other parcels of land involved in the suit, not the judgment appealed from herein, was entered on July 13, 1949, and is now final. [Tr. 67-79.]

Thereafter, in a separate proceeding, but in the same case, the lessee, and other holders of parts of the working interest, being various royalty interests assigned by the lessee, or derived from assignments made by the lessee, petitioned the court for distribution of the award. Their claims are in part conflicting. A hearing on these claims was held by the court and judgment was entered October 30, 1950. [Tr. 154-156.] The case comes up on an appeal by all parties from that judgment.

The parties to the appeal are the Reconstruction Finance Corporation, in its capacity as assignee of Treasure Com-

pany, the lessee; The Adamant Company, Walter B. Scoville and Harry Wynn, who hold assignments made by the lessee of participating royalty interests in the well; Herschel Bullen and Mary H. Bullen, his wife, and J. C. Hayward and Mary S. Hayward, his wife (hereinafter sometimes referred to as the Bullens and Haywards), who hold assignments from Walter B. Scoville of participating royalty interests, being a part of the royalties theretofore assigned to Scoville by the lessee, Treasure Company, and who also hold an agreement, the so-called two for one agreement, entitling them to the payment of $10,000.00 out of 15% of all oil and gas produced from the well; J. Orville Seeple, whose interest for the purpose of this proceeding is identical with that of Walter B. Scoville. [Tr. 96-97, and Finding XXXI, Tr. 148]; and the United States.

B. Questions Involved, and How They Arise.

The questions which affect only the rights of the appellants Bullen and Hayward are as follows:

(1) Does an agreement which provides for the payment of $10,000.00 out of 15% of the gross production of an oil well give the holder of the agreement a property interest in the well?

The trial court held that such an agreement is merely a personal obligation, and creates no royalty or other property interest in the leasehold upon which the well is drilled [Conclusion of Law VII, Tr. 152]. The Bullens and Haywards appeal from that holding.

(2) Where such agreement is not executed by the owners of all interests in the leasehold, but all such owners had knowledge of the agreement, and benefited by the money which was paid for the agreement, are they all bound by it?

The trial court held that they were not so bound [Finding XXV, Tr. 146]. The Bullens and Haywards appeal from such ruling.

(3) Where such an agreement is executed by the owner of a royalty interest, does the agreement convey whatever interest that person had?

The trial court did not specifically rule on this point, but held, as noted above, that the agreement was only a personal obligation, and consequently not enforceable against any property involved in this proceeding, from which holding the Bullens and Haywards appeal.

Questions which affect the rights of all participating royalty holders, including the Bullens and Haywards, are as follows:

(4) Does the holder of a participating royalty which entitles him to the payment of a certain percentage of the net proceeds of the sale of oil and gas produced from an oil well, after the payment of operatng expenses, have an equitable lien on the lessee's interest in the leasehold, to secure the payment of any such net proceeds which were wrongfully withheld from the royalty holder by the lessee in charge of the well?

The trial court held that there was no such lien. (Finding XXVIII, Tr. 147.] From this ruling the Bullens and Haywards, and presumably other royalty holders, appeal.

(5) If such lien exists, is it binding upon a purchaser of the lessee's interest, who takes with notice of the outstanding royalties?

The trial court did not rule on the point, doubtless because of that court's holding that no such lien existed.

(6) Where there are landowners' royalties outstanding, entitling the landowners to 19.4% of the production from an oil well, can the lessee, which owns the remaining 80.6% of the total production, assign 49% of the total production from said well, and have left anything more than 80.6% minus 49%, or 31.6%?

The trial court held, in effect, that it could. [Finding XVIII, Tr. 142, Conclusion of Law X, Tr. 153.] The Bullens and Haywards, and presumably the holders of all other participating royalties, appeal from that decision.

Another minor question involving only the Bullens and Haywards, is as follows:

(7) Where the parties to an accounting action stipulate that the master appointed by the court in that action shall be paid out of a fund deposited in court in a condemnation suit, can that stipulation be binding upon anyone who was not a party to the accounting suit, or to the stipulation?

The trial court held, in effect, that such a stipulation was binding upon the Bullens and Haywards, who appeal from that decision. [Finding XXVII, Tr. 146-147, Conclusion of Law X, Tr. 153.]

The questions involved in the controversy between Reconstruction Finance Corporation and Harry Wynn as to the ownership of certain royalties are not stated here, since the Bullens and Haywards are not affected thereby.

The questions involved in the appeal of the United States and also of the Reconstruction Finance Corporation on the point of whether the award was made for one or two leases, are not discussed in this brief, because the trial court ruled in favor of these appellants and the other participating royalty holders on that point, and any discussion thereof by the appellants Bullen and Hayward will be reserved for their brief as appellees.

C. Statement of Facts.

Treasure Company was the owner of the lessee's interest in oil leases on certain parcels of land in the Del Rey Hills, Los Angeles County, California. Two of these leases, being the ones with which we are here concerned, are known as the Fletcher Lease and the Burns No. 1 Lease.

Treasure Company commenced the drilling of an oil and gas well on Lot 9 of the Fletcher Lease, which well thereafter became known as Treasure Well No. 8. In drilling the well Treasure Company ran into financial difficulties and negotiations were started with The Adamant Company through Walter B. Scoville looking toward financing the well and completing it. The negotiations resulted in the execution of a written contract, dated April 5, 1938, between Treasure Company, as first party, The Adamant Company, as second party, and Walter B. Scoville, as third party. [Treasure Company's Exhibit QQ in this proceeding. An addendum to that agreement is Treasure Company's Exhibit RR in this proceeding.]

The agreement of April 5, 1938, recited that Treasure Company had acquired the Fletcher and Burns No. 1 Leases, among others, that it had commenced the drilling of a well on the Fletcher Lease, that it proposed to combine the Burns No. 1 Lease "with the above-mentioned Fletcher Lease in the one drill site," and that it desired funds to complete the well. The Adamant Company agreed to advance the sum of $10,000.00 to be used for that purpose. Treasure Company agreed to assign to The Adamant Company a 25% participating royalty interest in all leases, and to assign to Walter B. Scoville a participating royalty interest of 19% "in the Fletcher and Burns No. 1 Lease if the well is completed for less than 1,000 barrels."

The well was so completed for less than 1,000 barrels. The agreement further provided that should the first well be completed for 200 barrels per day or less, the agreement would terminate, and that The Adamant Company and Scoville would quitclaim to Treasure Company all their interests "except as to such first well." The first well, which is known as Treasure Well No. 8, was completed for less than 200 barrels per day, and no other well was ever drilled.

In order to obtain funds to assist The Adamant Company in complying with its obligations under this agreement, Walter B. Scoville entered into an agreement with the Bullens and Haywards, petitioners and appellants herein, whereby they agreed to contribute a total of $5,000.00, $2,500.00 from each couple, to be used in completing the well. The money was paid over and was so used. In consideration thereof, Walter B. Scoville agreed to assign to each couple from his royalty interest a 1% interest, or an aggregate of 2%. Scoville also agreed that the money so invested was to be repaid two for one out of the first 15% of gross production from the well. The plan as evolved by Walter B. Scoville was approved by both The Adamant Company and Treasure Company. [Findings XXIV and XXV, Tr. 145-146.] The court refused to allow these appellants any part of the award for this latter agreement, and allowed appellants $1,917.00 for each of the 1% interests, or a total of $3,834.00.

The agreement with the Bullens and Haywards is in writing, and consists of two documents. One is a letter

dated September 27, 1938, from Herschel Bullen to George Halverson, a Los Angeles attorney, who was at that time representing Walter B. Scoville and The Adamant Company in their negotiations with Treasure Company. This letter encloses two cashier's checks in the amount of $2,500.00 each, and authorizes their use upon compliance with the terms of the letter, and compliance with an application to the Commissioner of Corporations of the State of California, which was also enclosed with the letter, and which is the second document making up the written contract. Both the letter and the application, in paragraph II thereof, state the consideration which the Bullens and Haywards were to receive, viz., two participating royalties of 1% each, and repayment of the money two for one out of production, *i. e.,* $10,000.00, which, as stated in the letter, was to come out of the first 15% of the gross production from the well. At the bottom of the letter is the typed statement, "We agree to the foregoing." The signatures of both Walter B. Scoville and The Adamant Company were affixed to this statement.

A carbon copy of the letter is in evidence as petitioners Hayward and Bullens' Exhibit 1. The original has been lost. However, the copy in evidence also bears the signature of Walter B. Scoville, so it is an original as far as he is concerned. [Tr. 1196-1198, and 1226.]

The application to the Commissioner of Corporations which, as noted above, also sets forth in paragraph II thereof the consideration to be received by the Bullens and

Haywards, contains a statement at the end thereof as follows:

> "Treasure Company, the issuer of the securities involved in the foregoing application, does hereby join in and consent to said application."

Below that is the signature of Treasure Company, by its secretary, I. Cowan, and its corporate seal. Below that is the following:

> "J. Orville Seeple, as agent of Walter B. Scoville and The Adamant Company, does hereby join in and consent to the foregoing Application and the transfer therein referred to."

Below this appears the signatures of The Adamant Company, by Helen Scoville, Secretary and J. Orville Seeple. [Page 4 of the application, which is the fifth document of petitioners Hayward and Bullens' Exhibit 2. See also, [Tr. 1200-1203.]

The agreement of April 5, 1938 [Treasure Company's Exhibit QQ] in the last paragraph thereof, as modified by the addendum [Treasure Company's Exhibit RR], provides for management of the well by an executive committee consisting of J. Orville Seeple, representing The Adamant Company, G. de Bretteville, representing Treasure Company, and Harry Wynn. The cashier's checks by which the Bullens and Haywards paid in their investment were made payable by endorsement to "Treasure Company Trust Fund" and were endorsed "Treasure Company Trust Fund, by G. de Bretteville, Trustee."

[Petitioners Hayward and Bullens' Exhibits 3 and 4, and Tr. 1204-1205.] de Bretteville was also the President of Treasure Company.

Pursuant to the agreement of April 5, 1938, Treasure Company issued assignments to The Adamant Company of participating royalty interests covering 25% of all oil and gas from the leases owned by it and described in the agreement, to Walter B. Scoville 19% of all oil and gas produced from the Fletcher and Burns No. 1 Leases, and to Harry Wynn 2½% of all the leases. [Finding XVI, Tr. 140.] Treasure Company later agreed to issue to Harry Wynn an additional 2½%. [Tr. 144.] Walter B. Scoville also agreed to assign 1% to Harry Wynn, which came out of said Walter B. Scoville's 19% interest. [Finding XXVI, Tr. 146.]

Pursuant to the agreement of September 27, 1938, Walter B. Scoville made a formal assignment of a 1% participating royalty to Herschel Bullen and Mary H. Bullen and another 1% to J. C. Hayward and Mary S. Hayward. [Finding XVII, Tr. 141-142, and see the second and third documents of petitioners Hayward and Bullens' Exhibit 2. These are assignments dated October 2, 1938, from Scoville to said petitioners, respectively, of 1% to each couple, or an aggregate of 2% of the production from all the leases. In so far as they pertain to Burns' No. 2 and No. 3 Leases, they are no longer effective, because, as noted above, the first and only well, Treasure Well No. 8, was brought in for less than 200 barrels per day, so that Scoville's rights under the agree-

ment of April 5, 1938, terminated, and consequently the rights of his assignees terminated, except for the interest in said first well.]

No separate assignment was ever made to the Bullens and Haywards of their right to 15% of the gross production from Treasure Well No. 8, limited to the payment to them of $10,000.00, and their rights to such limited royalty interest depend upon the contract of September 27, 1938. [Petitioners Hayward and Bullens' Exhibit 1, p. 2 thereof, and the fifth document of their Exhibit 2, par. II thereof.]

In the valuation trial which occurred before this proceeding, settlement was made with the holders of landowners' royalties, and the jury put a value of $194,500.00 upon the working interest in Treasure Well No. 8. [Tr. 65, 4th item.] Judgment was duly entered upon the verdict [Tr. 67-79], and is now final. By stipulation of the parties the landowners' percentage of production was 19.4% [Tr. 1165], leaving 80.6% as the working interest.

Summarizing the assignments above set out, this 80.6%, which is now represented by the award of $194,500.00, was held as follows:

First: 15% of the gross production from the well was to be paid out of this interest to the Bullens and Haywards until they received $10,000.00 (plus interest on sums accrued and not paid);

Second: Subject to payment of the foregoing sum, and interest, the ownership of said 80.6% of the total production from the well was as follows:

The Adamant Company	25% of total production
Walter B. Scoville (19% less 2% assigned to Bullens and Haywards and 1% assigned to Harry Wynn)	16% of total production
Bullens and Haywards	2% of total production
Harry Wynn	6% of total production
Total percentage of production assigned by the lessee, Treasure Company	49% of total production
Balance owing to Treasure Company, the lessee, or its successor Reconstruction Finance Corporation	31.6% of total production
Total working interest	80.6% of total production

Upon the completion of Treasure Well No. 8, a dispute arose among the parties to the agreement of April 5, 1938. The drilling had been in charge of the committee appointed under that agreement and the addendum thereto, but on December 16, 1938, the well was taken over by Treasure Company, and it was in the possession of and operated by that company until it was condemned by the Government in this case. During the period of operation by Treasure Company, the oil and gas produced from the well were sold for $205,411.69 [Tr. 1235-1236], no part of which was ever paid over to the royalty holders who are parties to this proceeding. [Tr. 1216-1217.]

In June of 1939, Walter B. Scoville, J. Orville Seeple, Harry Wynn and The Adamant Company brought suit in the Superior Court of the County of Los Angeles, State of California, against G. de Bretteville and Treasure Company, seeking to have a receiver appointed to take possession of the property, and for an accounting. In this case, which has been referred to in this proceeding as the Vickers case, Judge Vickers found that the well, Treasure Well No. 8, had been completed for less than 200 barrels per day, and held, therefore, that the agreement of April 5, 1938, and the addendum thereto, had terminated, except for the royalty interests in Treasure Well No. 8, and that such interests continued. This judgment was affirmed on appeal. (*Scoville v. de Bretteville,* 50 Cal. App. 2d 622, 123 P. 2d 616.)

The Adamant Company and Walter B. Scoville brought another accounting suit against Treasure Company and G. de Bretteville, which is now pending before another Judge in the United States District Court for the Southern District of California, Central Division. A Special Master was appointed, and made a report in that case, and by stipulation of the parties, the court made an award to him of $2,800.00 as compensation for services. The parties further stipulated that said $2,800.00 would be deducted from the $194,500.00 award made by the jury in this case. Judge Westover accordingly found that the award should be reduced to a net of $191,700.00. [Finding XXVII, Tr. 147.] The appellants Bullen and Hayward are not parties to the accounting action or to said stipulation, but the court herein nevertheless used such reduced amount in determining their interest. [Conclusion of Law X, Tr. 153.]

Specification of Errors.

1. The court erred in holding that the enforcement of the so-called two for one agreement was a personal matter, and not one for settlement in this case. [Conclusion of Law VII, Tr. 152.]

2. The court erred in finding that neither Treasure Company nor The Adamant Company is bound by the two for one agreement. [Finding XXV, Tr. 146.]

3. The court erred in failing to hold that the two for one agreement should be enforced at least against the interest of Walter B. Scoville in the award made in this case.

4. The court erred in holding that the Bullens and Haywards have no equitable lien upon moneys due to any of the parties herein. [Finding XXVIII, Tr. 147.]

5. The court erred in holding that the percentages assigned by Treasure Company to participating royalty holders were percentages of the working interest rather than percentages of total production from the well. [Finding XVIII, Tr. 142; Conclusion of Law X, Tr. 153.]

6. The court erred, so far as the Bullens and Haywards are concerned, in reducing the award by the amount of the Master's fee in the accounting case. [Finding XXVII, Tr. 146-147, and also Conclusion of Law X, Tr. 153.]

ARGUMENT.

I.

The Two for One Agreement Is a Royalty.

Over a period of years, the California courts have thoroughly considered and determined the nature of a wide range of instruments by which the owner of the right to take oil from the ground has assigned or agreed to pay over to another a part of such oil, or the proceeds of sale thereof. It has now been definitely established that the holder of such an assignment or agreement has a present legal property interest, known as a royalty. While the royalty holder does not have an undivided interest in the profit *a prendre,* because he has no right to possession of the property, and no right to take the oil himself, he nevertheless has an interest in the real property. These general propositions are now too well settled to require any argument or authority.

Fortunately for the appellants in this case, a royalty of the precise kind created by the two for one agreement has been passed upon by the California courts. This was the instrument involved in the case of *Recovery Oil Co. v. Van Acker,* which was before the District Court of Appeal on two occasions, reported in 79 Cal. App. 2d 639, 180 P. 2d 436, and 96 Cal. App. 2d 909, 216 P. 2d 483.

In this case, certain people held a prospecting permit authorizing them to explore for oil on land owned by the United States. They executed a document reading in part as follows:

> "The undersigned hereby assigns, transfers and sets over to N. E. Grable the proceeds from Fifteen per cent (15%) of the oil, gas and other hydrocarbon

> substances produced, saved and sold from the said premises so covered by said Operating Agreement, (less amount used in operations on the premises) until such time as said assignee shall have received the sum of Twenty Thousand Dollars ($20,000.00) and no more; and upon full payment of said sum this assignment shall terminate and be at an end." (79 Cal. App. 2d at 640.)

Thereafter the holder of this assignment assigned a half interest in it to one of the defendants, the appellant in the first case. The interest of the original permit holders was acquired by the plaintiff corporation, which brought a quiet title suit seeking, among other things, to quiet its title against the rights of the holder of said assignment.

We thus have a case which, by a strange coincidence, is exactly the same as the case at bar, even as to the figures. In the *Van Acker* case, the holder of the second assignment, which was half of the first one, was entitled to 15% of all oil produced, saved and sold until she had received payment of $10,000.00. In our case the appellants Bullen and Hayward, under the two for one agreement, are entitled to $10,000.00, to be paid out of the first 15% of gross production.

When the appellants Bullen and Hayward paid in their $5,000.00 the money was sent with a letter [Petitioners Bullen and Haywards' Exhibit 1] which stated the following as one of the conditions upon which the money was to be accepted and used:

> "First, when Walter B. Scoville and certain of his friends advance the necessary funds—these funds, $5,000.00, to be included in the said necessary funds to be repaid two for one out of production—to fully

comply with paragraph II of page 2 of said application herewith enclosed, it being understood and agreed to that the said two for one out of production is to be repaid out of the first 15% of gross production from the said well."

Paragraph II of the application which was enclosed in the same letter, and is referred to in the above quotation, reads in part as follows:

"The well described in the application of Treasure Company for a permit has been drilled to the depth of 6510 feet and is now ready for completion. In the opinion of all interested parties the cores and technical tests fully justify the completion and testing of this well. Applicant, Walter B. Scoville, desires to assist in completing said well and certain of his friends and business associates are willing to advance the necessary funds, to be repaid two for one out of production."

The terms of the letter were agreed to by The Adamant Company and Walter B. Scoville, and the application was agreed to by Treasure Company. [Petitioners Bullen and Haywards' Exhibit 2, p. 4 of the next to the last document.]

We thus have in the case at bar a somewhat informal agreement, as compared with the formal assignment in the *Van Acker* case, but the substance of the writing is the same in each case. The effect of the assignment in the *Van Acker* case was merely an agreement on the part of the owner of the prospecting permit to pay to the predecessor of the appellant in that case 15% of the proceeds of the total production until $20,000.00 had been paid,

of which the appellant, the holder of a subsequent assignment of a one-half interest, was entitled to $10,000.00.

The use of language of assignment instead of language of agreement to pay cannot make any distinction in substance. Even if the *Van Acker* document be regarded as an executed transaction in the nature of a deed, and our document be considered as executory, there could be no difference in result. It is fundamental that an agreement to sell real property, or an interest therein, vests equitable title in the buyer which is good as between the parties and against all having notice thereof. Indeed, the California Supreme Court has indicated that even a partly performed oral agreement to pay over a percentage of the net proceeds of oil and gas gives a property interest. (*Austin v. Hallmark Oil Co.,* 21 Cal 2d 718, 134 P. 2d 777.) In that case, the court said at page 726, the California report:

> "By virtue of the oral grubstake agreement, Austin became the equitable owner of an undivided fifty per cent interest in any lease obtained by Porter pursuant to that agreement. (See *Berry v. Woodburn,* 107 Cal. 504 (40 P. 802); *Moritz v. Lavelle,* 77 Cal. 10 (18 P. 803, 11 Am. St. Rep. 229).) When, however, Porter subsequently assigned the lease to the Hallmark Oil Company, Inc., with Austin's consent, retaining an interest in fifty per cent of the net income of the leasehold, Austin's equitable interest or ownership was thereby limited to a share in the interest thus retained by Porter. It therefore appears that Austin's claim and the judgment do not rest solely upon the written assignment of November 2nd, and that the assignment was made in recognition of rights already possessed by Austin."

The *Van Acker* case is therefore on all fours with the case at bar, and it unequivocally holds that the right to receive 15% of the production until $10,000.00 had been paid is a royalty interest, and therefore an interest in the land.

On the first appeal the trial court had quieted the title of the plaintiff as against this interest, and the judgment was reversed. One of the points raised by the respondent was: ". . . that the instrument did not assign any interest in the land but merely constituted a personal promise to pay money out of a particular fund." (79 Cal. App. 2d 641.) The court dealt with this contention at pages 642 and 643, citing cases which hold that the form of the document is immaterial, and that the holder of a right to receive a share of the oil produced, or the proceeds of sale thereof, gross or net, has a property interest, good as against all who take with notice thereof.

In the second appeal (96 Cal. App. 2d 909, 216 P. 2d 483), there was a judgment for the defendant upholding the royalty interest, from which the plaintiff oil company appealed. On this appeal the plaintiff urged again a point which it had made in the first case, and which had been left open, this being the plaintiff's contention that the instrument, even if it gave a property interest, merely created a lien on the oil produced to secure the payment of the $10,000.00, and that it was barred by the statute of limitations. On this point the court held (96 Cal. App. 2d at 912) that the respondent had a legal title and not a mere lien:

> "Her interest was vested as an estate, and not as a lien. Her position was similar to that of the holder of a trust deed."

The judgment for the defendant was affirmed. The case is therefore a clear decision to the effect that the holder of such an instrument has legal title to a limited royalty interest which continues until the money is paid, and which cannot be barred by the statute of limitations.

Another point raised by the appellant in the *Van Acker* case, or perhaps it is another facet of the statute of limitations point, was that long before this case arose, there had been produced from the premises sufficient oil to pay the defendant in full. The court held this to be immaterial, saying at page 912:

> "The assignments by which the respondent acquired her interest assigned to her a certain share in the production from the land until such time as she received $10,000. Her interest was to terminate when she received this amount, otherwise it would run for the full term of the lease. No date was fixed for the termination of her interest and it was conditioned upon her receiving the money, and not upon the production of an amount sufficient to pay the money."

A petition for a hearing by the Supreme Court in the *Van Acker* case was denied.

Applying that case here, it necessarily follows that the appellants Bullen and Hayward acquired by the terms of the letter agreement a vested interest in the leasehold which would continue until they had received the sum of $10,000.00. They have not received any payment thereon, and they therefore had this interest in the property when it was condemned by the Government.

The judgment entered by the court in the condemnation case proper, which is now final, expressly provided that:

> ". . . all valid liens, encumbrances and claims of whatsoever nature and description in said property, or any part thereof, are transferred from said property to the compensation payable by the plaintiff therefor." [Tr. 74.]

This would, of course, be the law, even if the judgment had not so provided. *United States v. Certain Parcels of Land in Prince George's County,* 40 Fed. Supp. 436. In that case the court said at page 443:

> "It is also to be noted that the effect of the taking by the authorized authority is to vest both title and possession in the Government and therefore presumably to *transfer all claims,* both *of ownership and lienors, whether legal or equitable,* to the fund, at least so far as such liens and charges may exist in favor of persons named or otherwise bound by the proceeding." (Italics ours.)

We respectfully submit, therefore, that the appellants Bullen and Hayward are entitled to have paid to them the sum of $10,000.00 out of the award which was made for the well, and that they are likewise entitled to interest on the component parts of this sum from the times when payments of parts thereof should have been made by the operator of the well, and that a further trial should be had to determine when the rights to such payments accrued, so that interest may be accurately determined, unless the parties can agree thereon.

II.

The Two for One Agreement Is Binding on All Owners of the Working Interest.

The various holders of the working interest before the court are as follows:

(1) Reconstruction Finance Corporation, which is an assignee of the lessee, Treasure Company. The assignment was made after this litigation commenced, and the R. F. C., therefore, took with full knowledge of the rights of the appellants Bullen and Hayward.

As has been noted, the two for one agreement is made up of two documents, the letter and the application, both of which set out the rights of the appellants Bullen and Hayward to be repaid their investment two for one out of production. Treasure Company did not sign the letter, but it did sign the application as follows:

> "Treasure Company, the issuer of the securities involved in the foregoing application, does hereby join in and consent to said application.
>
> Treasure Company,
> By: I. Cowan,
> Secy."

The corporate seal of the company was affixed. [Tr. 1201; Petitioners Hayward and Bullens' Exhibit 2, p. 4 of the next to the last document.]

It may be urged, and doubtless will be, that the consent of Treasure Company to this application was merely to indicate its consent to the transfer in escrow of the participating royalty interests. It is true that the purpose of the application was to obtain the consent of the Commissioner to this transfer, said royalty assignments having

been required by his permit to be placed in escrow, and not transferred without his consent. However, paragraph II of the application, on page 5 thereof, clearly states the entire deal with the Bullens and Haywards, under which they were to get not only a continuing 2% participating royalty interest, but their investment was to be repaid two for one out of production. At the very least, therefore, the consent of Treasure Company to the application shows knowledge of the terms upon which the money was provided by the appellants Bullen and Hayward. In fact, the court specifically found that:

> "The plan as evolved by Walter B. Scoville was approved by both Adamant Company and Treasure Company." [Finding XXV, Tr. 146.]

As noted in the Statement of Facts, the cashier's checks by which the appellants Bullen and Hayward paid in their investment were, by endorsement, made payable to "Treasure Company Trust Fund," and were endorsed "Treasure Company Trust Fund, by G. de Bretteville, Trustee." [Petitioners Bullen and Haywards' Exhibits 3 and 4, and Tr. 1204-1205.] de Bretteville was the president of Treasure Company. In addition, the court made a specific finding that the money was used in completing the well. [Finding XXIV, Tr. 145.] The well was at that time in possession of a committee appointed pursuant to an agreement entered into by Treasure Company, the lessee. One member of the committee was G. de Bretteville, appointed specifically to represent Treasure Company. [Treasure Company Exhibit QQ.]

We thus have a situation in which Treasure Company, even though the court should consider that it is not a party to the agreement, accepted the money of the appel-

lants Bullen and Hayward through representatives acting in its behalf, said money being accepted with knowledge of the terms upon which it was advanced. and the money was used for its benefit. Under these circumstances, it is submitted that Treasure Company is estopped to deny that it was a party to the agreement, and must be held to be bound by all of its terms and provisions. The law is well expressed in Section 1589 of the Civil Code, which reads as follows:

> "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

In *First National Finance Corporation v. Five-O Drilling Co.,* 209 Cal. 569, at 575, 289 Pac. 844 at 846, the court states:

> "The law does not permit a corporation to receive and retain the benefits of a contract or transaction and at the same time repudiate liability thereunder or attempt to escape the burdens thereof on the ground that the contract or transaction was not authorized, or that the authority therefor was not set forth in its records." (Citing cases.)

(2) The Adamant Company: The evidence shows that The Adamant Company signed the letter agreement, and it is believed that the finding of the learned trial court to the contrary [Finding XXV, Tr. 146] must have been inadvertent.

The carbon copy of the letter agreement of September 27, 1938 [Petitioners Bullen and Haywards' Exhibit 1] contained at the end thereof, under the endorsement "We

agree to the foregoing," what purports to be a signature "The Adamant Company, by Helen Scoville, Secretary." This signature was written on the document by appellant Bullen, because he received a letter from George Halverson, the attorney to whom the original letter had been sent, who was attorney of The Adamant Company [Tr. 1240], and who acted as escrow holder in the matter, stating:

> "we merely had the Adamant Company and Walter B. Scoville Company and Walter B. Scoville agree to the terms contained in that letter." [Tr. 1218-1219.]

The letter of March 25, 1939, from Halverson, making this statement about the original of the letter of September 27, 1938, was admitted in evidence. [Tr. 1293.] It was stipulated that Mrs. Scoville was authorized to sign the letter agreement of September 27, 1938. [Tr. 1223-1224, and 1240.]

Possibly there is some ambiguity in the stipulation as to whether or not it was intended to stipulate that the document bore the signature of Helen Scoville, or only that she had authority to sign it, and it must be admitted that the testimony of Mr. Halverson is not satisfactory on the question of whether or not she signed. He first testified that it bore her signature, but then added that he did not know her signature. [Tr. 1238-1239.] His letter, which is in evidence, states clearly. however, that he did have her agree to it, and it is at least stipulated that she had authority to do so.

Whatever the situation may be as to The Adamant Company being an actual party to the agreement, it is bound

by it, in any event, for the same reason that Treasure Company is bound by it. The Adamant Company was the owner of 25% of the total production of the well, subject to the payment of $\frac{25}{80.6}$ths of the operating costs. The well's completion, which was accomplished in part with the money of the appellants Bullen and Hayward, was, therefore, a direct benefit to it. It had knowledge of it, both through Halverson and as evidence by its approval of the application to the Commissioner of Corporations. [Petitioner Hayward and Bullen's Exhibit 2.] It cannot accept such benefit without accepting the burdens. (Civil Code, Sec. 1589.)

(3) Walter B. Scoville: The letter agreement of September 27, 1938 [Petitioners Hayward and Bullens' Exhibit 1], although it is a carbon copy, was in fact signed by Scoville [Tr. 1196], and he was the one who negotiated the transaction. As far as he is concerned, therefore, Exhibit 1 is an original.

(4) J. Orville Seeple: He was the agent of Walter B. Scoville and The Adamant Company, and represented them on the committee set up by the agreement of April 5, 1938, and the addendum thereto. [Treasure Company's Exhibits QQ and RR, respectively, in this proceeding.] Seeple's name also appears as a signer of the application to the Commissioner of Corporations [page 4 of the next to the last document of Bullen and Haywards' Exhibit 2.] Furthermore his interest is identical in this proceeding with that of Walter B. Scoville. [Finding XXXI, Tr. 148 and see Tr. 96-97.]

(5) Harry Wynn: He was a member of the committee which had charge of the completion of the well, being

appointed by the addendum to the agreement of April 5, 1938 [Treasure Company's Exhibit QQ], so that presumably he had knowledge of the terms of the financing which was done to provide for such completion. He also, as a royalty holder, benefited from the use of this money.

III.

The Two for One Agreement Is at Least a Charge on the Interest of Walter B. Scoville.

It appears from the foregoing that everyone owning part of the working interest in the well is bound by the two for one agreement. In any event, that agreement is, without any question of doubt, binding upon Walter B. Scoville, the man who negotiated it and who signed the copy of the letter of September 27, 1938, which sets it forth.

Assuming, for the sake of argument, that the agreement is binding only upon Scoville, it was manifestly error for the court to give it no effect whatever. On that view of the case, that is to say, assuming it was not binding upon anyone except Scoville, it was certainly effective to convey an interest out of whatever interest he held, and, as the court found, he held 19%, diminished by the 2% assigned to the appellants Bullen and Hayward and the 1% assigned to Harry Wynn, or a net interest of 16%. [Tr. 153.] Certainly anything which goes to him on this 16% must first be used to pay the appellants Bullen and Hayward under the two for one agreement. It is elementary that a conveyance which purports to convey more than the grantor owns does convey whatever he does own.

The situation here, still assuming that the agreement is binding only upon Scoville, would be closely analogous to a conveyance by one co-tenant of a specific parcel of the

entire property, without obtaining the consent of the other co-tenants. While this cannot affect the rights of the other co-tenants, the conveyance is valid and passes the interest of the grantor. (7 Cal. Jur. 359; *Gapes v. Salmon,* 35 Cal. 576 at 588.)

It is respectfully submitted that for this error, if for no other reason, the judgment which held that the two for one agreement was merely a personal obligation [Finding VII, Tr. 152], must be reversed.

IV.

The Appellants Bullen and Hayward and Other Holders of Participating Royalties Have an Equitable Lien Upon the Interest in the Well of the Lessee, Treasure Company, to Secure the Payment to Them of Their Share of the Net Proceeds of Operation.

The trial court properly held that the holders of participating royalties had a property interest in the well. [Finding XXXIV, Tr. 149; Conclusion of Law IV, Tr. 151.] Such a holding was, of course, necessitated by the leading case of *Schiffman v. Richfield Oil Co.,* 8 Cal. 2d 211, 64 P. 2d 1081, which held that the holders of participating royalties, that is to say, the holders of agreements entitling them to share in the net proceeds of the sale of oil produced, saved and sold, after payment of operating expenses, had a property interest in the well from which the oil was produced, which could not be cut off by sale of the lease to a purchaser who was chargeable with notice of their rights. At the time the *Schiffman* case was decided, the law in California on the subject of royalties had not crystallized, and it may be gathered from the opinion that the basis of it was that it would be inequitable to permit any other result.

The same conclusion had been reached by courts of equity centuries before. The principle of the equitable lien is an ancient one. In *Legard v. Hodges,* 1 Ves. Jun. 477, 29 English Reports Chancery, 684, the defendant, Anthony Hodges, at the time of his marriage, made a covenant that he would pay into the hands of the plaintiffs, as trustees, the sum of 10,000 pounds, and that "he would, after three years from the solemnization of the marriage, set apart an appopriate amount as a fund toward raising said 10,000 pounds, one-third part of the yearly rents arising from his several estates in Berks and Oxford . . ." No part of the 10,000 pounds was paid, and plaintiffs filed this bill charging that the produce of the estates ought to be accounted to them, and one-third part thereof applied for the purpose of raising the 10,000 pounds, and praying an account of rents and profits received from the estates.

Mr. Mansfield and others for the defendants argued (page 696 of 29 English Reports) that "the covenant is merely a personal covenant by Hodges to appropriate the third part of the produce to the payment of the 10,000 pounds. An action would lie for the breach of it, and in such action damages to the amount of the third part might be recovered. But the estate itself is not bound by the covenant; there is no lien upon the estate itself." The Lord Chancellor after distinguishing a case cited by the defendants, said, at page 687:

> "I take the doctrine to be true, that where the parties come to an agreement as to the produce of the land, that the land itself will be affected by the agreement."

And again on page 688, referring to a case which he had distinguished, he said:

> "But, except that case, there are none to derogate from the generality of the doctrine that where a man makes an agreement relative to any subject, it will bind the subject itself."

There would seem to be no reason why this general rule should not be applied to give the holders of the participating royalties a lien upon the leasehold to secure the payment to them of sums which the lessee in possession, Treasure Company, should have paid to them. Equity should not stop by saying that they have a continuing property interest, which was obviously intended, and which the California courts now hold, is a legal interest, but should go further, and give them complete relief. When the lessee agreed, by the assignments, that the holders thereof should be entitled to a certain percentage of the net proceeds of oil and gas produced, the lessee, in effect, agreed to hold the lease in trust for the assignees. Although the California courts have gone further and give the assignees a legal interest, the practical result is the same, and the meaning is the same, as the opinion in the *Schiffman* case will show. The same principles would require that the obligation to pay the money which was not paid should be a charge upon the property in the hands of the lessee, or rather upon whatever interest the lessee may have in the property.

An instance of the application of the doctrine of the equitable lien in an oil case is *Phillips Petroleum Co. v. Gable,* 128 F. 2d 943. In this case, Dixie, the operator of an oil well, bought some casing from the plaintiff, and agreed to pay a certain sum for it "out of the first

proceeds of one-half of Dixie's present interest in the production from said well." Some time later, Dixie borrowed some money from Morris, and secured it by a mortgage on its entire interest in the well. The operator later went into bankruptcy.

The court states at page 944:

> "The contract gave Phillips an equitable lien upon one-half of Dixie's 30 per cent interest in the first proceeds from production from the well. (Citing cases.) The recording of the contract gave Morris constructive notice of the equitable lien, and required it to make reasonable inquiry. Had it done so, it would have discovered the Phillips lien and learned the debt secured thereby had not been fully paid."

We have no need to apply this case to the two for one agreement of the appellants Bullen and Hayward, because in California, as shown above, such an interest is a legal interest in the nature of a trust deed. However, the principle is the same, and the basic reason for deciding that the holder of such an agreement has a legal title or a lien, as the case may be, is the equitable doctrine that an agreement to make payments from the income of certain property creates a charge upon the property, and the reason for the doctrine is simply that equity and good conscience require such a result.

It may be noted that there is a distinction between the nature of the interest of the Bullens and Haywards and those of the holder of the interest which was enforced in the *Phillips Petroleum* case. There the holder of the equitable lien was an ordinary creditor, and his claim was enforced in bankruptcy. While some of the language used in the documents setting up the interest of the ap-

pellants Bullen and Hayward might indicate a debtor-creditor relationship, it is clear that they were investors only. They put their money into a wildcat oil well, and the deal was that if successful, not only would they get it back two for one, but they would also have a continuing small participation. No one, not even Scoville, agreed to repay the money, although it is spoken of as being "advanced." Repayment of the money, as well as the continued participation, was entirely contingent upon the successful completion of the well, or at least upon the successful completion of oil wells. We use the plural in this connection because the letter agreement of September 27, 1938 [petitioners Bullen and Haywards' Exhibit 1], did provide, in the third numbered paragraph thereof, that if the well was a failure, appellants Bullen and Hayward were to have comparable interests in certain property owned by Scoville or The Adamant Company in Wyoming. However, there was no time fixed for payment, and no personal obligation whatever of anyone to pay, the repayment being entirely contingent upon the coming in of one or more oil wells. As against any ordinary creditors of the enterprise, therefore, the appellants Bullen and Hayward and the other participating royalty holders could not have a lien. In fact they could not even share in assets until ordinary creditors were paid in full. (*In re Lathrap,* 61 F. 2d 37.) There are no ordinary creditors involved here, however. The question is simply whether the investors have an equitable lien as against the person who had charge of the enterprise, and purchasers with notice.

The *Phillips Petroleum* case is the only one we have been able to find in which the doctrine of the equitable lien has been applied in an oil case. This branch of our

case is somewhat different from the situation there, and also different from the factual situation in *Legard v. Hodges*. In both those cases there was an agreement to pay a specific sum out of the income from certain property. In our case there was an agreement to pay a certain percentage of net income from the property, to continue as long as there was income. This agreement, as held by the California courts, and followed by the district judge in this case, created a continuing interest in the property, a royalty. Our proposition is that when there was a subsequent failure to make specific payments which became due on the royalty, an equitable lien should attach and remain until such payments are made, for the same basic reasons that gave rise to the lien in the *Phillips Petroleum* case and *Legard v. Hodges*.

This charge should, of course, be made only against the remaining beneficial interest of the operating lessee, Treasure Company. That company was under a fiduciary relationship to the royalty holders. The latter had no right of possession, no right to go upon the property and take the oil themselves. They were simply investors in the enterprise, who had to look to the lessee to take out the oil, sell it, and give them their share. They were in the same position as the beneficiaries of a trust.

In this case the trustee was also a beneficiary. The lessee, after making the various royalty assignments, still had a part of the working interest left for itself. The law seems to be that when a trustee who is also a beneficiary commits a breach of trust, other beneficiaries have

a charge upon his beneficial interest to secure the payment to them of any losses caused by the breach. Such authorities are, perhaps, more closely in point than those dealing with the creation of an equitable lien to secure the payment of one sum agreed upon in advance.

It appears that the lien imposed upon the beneficial interest of a trustee who is also a beneficiary, to make good the breach of trust, comes ahead of the trustee's creditors. Mr. Scott in his work on Trusts, Volume 2, has this to say at page 1458:

> "Where a trustee is one of the beneficiaries of a trust and his creditors seek to reach his beneficial interest under the trust, they stand in no better position than that in which he stands. If the trustee-beneficiary has committed a breach of trust, so that his interest is liable to be impounded to make good the breach of trust, his creditors cannot take it free from the charge of the other beneficiaries upon it."

A distinction should doubtless be drawn here between creditors of the enterprise which is managed by the trustee and persons to whom the trustee owes money, whose advances had no relation to the trust property. At least such a distinction should be made where the beneficiaries stand in the position of investors in the enterprise, as they do here. (*Cf. In re Lathrap, supra.*) In any event, there are no creditors of any kind involved in the case at bar.

One of the cases cited by Scott is *Estate of Whitney,* 124 Cal. App. 109, 11 P. 2d 1107. In this case there were two trustees under a testamentary trust. One of

them was a bank officer. The other trustee allowed him to take charge of the money. He appropriated considerable sums. This trustee was also a beneficiary. The other trustee finally became suspicious, and employed a firm of auditors to examine the accounts, which resulted in the shortage being discovered. A surety on the trustee's bond made good a part of the loss for which it was responsible, and took an assignment of the trustee's beneficial interest in the trust. The court held that the expenses of the audit, and other expenses resulting from the defalcation, should be charged against and paid out of the defaulting trustee's beneficial interest in the trust. The court said at page 125:

> "Where, as here, the court still has this fund in its control, we are of the opinion that it has the power and that it is its duty to subject the same to the payment of claims justly chargeable thereto, before paying said fund to the defaulting trustee, or to this assignee."

In our case, the court likewise has control of the property out of which the payments should be made. The lease itself, as well as the fee of the property, has been condemned, and title has passed to the Government. In place of the lease, there is a sum of money in court. The beneficial interest therein of the defaulting lessee should be charged with payments which it was obligated to make to the other beneficiaries for whom it acted as trustee, before any part of the fund is paid over to lessee, or its assignee.

V.

The Reconstruction Finance Corporation, as the Successor of Treasure Company Is Bound by the Lien.

The interest of Treasure Company has been acquired by Reconstruction Finance Corporation with full notice of all the facts. [Finding XIII, Tr. 145.] Indeed, an accounting suit by some of the participating royalty holders was pending in the District Court when the Reconstruction Finance Corporation settled with Treasure Company and took over its interest. [Finding XXVII, Tr. 146.] The lien or charge upon the portion of the working interest owned by Treasure Company, and by it transferred to the R. F. C., should not, therefore, be in any way affected by such transfer. (*Phillips Petroleum Co. v. Gable, supra; Estate of Whitney, supra.*)

VI.

Appellants Bullen and Hayward Are Entitled, by Virtue of Their Ownership in the Aggregate of a 2% Participating Royalty, to Receive 2/80.6ths of the Award.

This point involves the rights of the other participating royalty holders as well as the appellants Bullen and Hayward, and we will leave the detailed development of it to their counsel. Fundamentally, it seems to us to be a question of the proper interpretation of the royalty assignments and of simple arithmetic.

Preliminarily, it may be noted that the award, in the amount of $194,500.00, was given for the working interest in the well. This is a technical term in the oil industry of which the court may take judicial notice, and means all interests in the well after excluding landowners' and

overriding royalties. The landowners' royalties and the overriding royalties do not share in expenses of operation, and are entitled to their percentage of the gross production, less only, in the normal case, a *pro rata* share of property taxes and costs of dehydration. The working interest is what is left after payment of these royalties. In this case, it was stipulated that the landowners' royalties were 19.4%. There were no overriding royalties, and there was therefore left a working interest of 80.6% of the total production from the well. The lessee had made assignments of portions of the production to others, who were required to share with it in the payment of operating costs, so that there was in this instance, as frequently happens, a division of the working interest between the lessee and the holders of participating royalties.

The pertinent portion of the assignments is set forth in Findings XVI and XVII. [Tr. 140-142.] A typical one, that to Walter B. Scoville, reads in part as follows:

> "That Treasure Company, . . . does hereby sell, assign, set over, transfer and convey to Walter B. Scoville, Nineteen one per cent (19%) participating royalty interests in all oil, gas and other hydrocarbon substances produced, saved and sold from the following described premises. . . ."

The phrase "participating royalty" is likewise one of art, and the court may take judicial notice that it means simply that the holder of the royalty interest pays his *pro rata* share of the costs of operation. It is clear, therefore, that this phrase does not measure the interest conveyed,

but only defines it. Omitting this phrase, and looking for the measure of the interest conveyed, we find that it is:

> "Nineteen one per cent (19%) interests in *all* oil, gas and other hydrocarbon substances produced, saved and sold from the following described premises . . ." (Emphasis added.)

We submit that on its face this royalty is clear, and conveys what it purports to convey, to wit, 19% of *all* oil and gas produced from the premises, subject to the obligation of the royalty holder to participate in the operating expenses. (This share of expenses would, of course, be $\frac{1}{80.6}$ for each 1% of royalty held, since the 19.40% landowners' royalty did not participate in expenses.)

On this view of the case, it is clear that the holder of each 1% participating royalty would be entitled to $\frac{1}{80.6}$ of the total ward. The trial court took the view that it was equally clear that a holder of a 1% participating royalty was entitled to $\frac{1}{100}$ of the total award [Tr. 142, 153], and would not receive any evidence on the quesion.

Should this court feel that the assignment is ambiguous, we ask that it take evidence on the point, since evidence is available to show the actual interpretation placed upon the document by the parties. Treasure Company did make payment from time to time on small participating royalties held by two persons whose interests have been acquired by

the R. F. C., and who are not parties to this proceeding. The books of Treasure Company will show how the share of costs and the share of net proceeds were computed.

We submit, however, that the documents are clear, and that after conveying to the various parties to this proceeding 49% of the total production from the well, Treasure Company, which started out with only 80.6% (100% less landowners' royalty of 19.4%) had left only 80.6%—49%, or 31.6% of the total production. It follows that R. F. C., as the successor of Treasure Company, has 31.6%, and the other parties have 49%. It also follows that the money which was awarded for the 80.6% working interest should be divided into 80.6 parts, of which $\frac{2}{80.6}$ go to the Bullens and Haywards $\frac{47}{80.6}$ go to the other assignees, and the remaining $\frac{31.6}{80.6}$ go to the R. F. C.

The award of $194,500.00 now stands in place of the working interest in the well. Each 1% participating royalty interest is therefore $\frac{1}{80.6}$ of $194,500.00, or $2,413.00. The Bullens and Haywards should, therefore, receive $2,413.00 each, instead of $1,917.00 each, which the judgment of the court gave them. [Tr. 153.] This figure, however, is subject to proportionate reduction by the payment of the $10,000.00 and interest under the two for one agreement, as a prior charge upon the entire award. [Tr. 1232-1233.]

VII.

The Award to the Bullens and Haywards for Their Participating Royalty Interests Should Not Be Reduced by Any Stipulation to Which They Were Not Parties.

Instead of using $194.500.00, the actual amount of the award, as the amount to be distributed, the court deducted therefrom $2,800.00, which was the fee of the Master in the accounting action above referred to between The Adamant Company, Walter B. Scoville and G. de Bretteville. [Finding XXVII, Tr. 146-147.] It was stipulated by the parties to that action that the fee should be paid out of the award in this case. The Bullens and Haywards were not parties to the accounting action, and did not enter into the stipulation. Therefore, so far as the Bullens and Haywards are concerned, the award should not be reduced, and any distribution to them should be based on a total award of $194,500.00.

Conclusion.

For the foregoing reasons the judgment should be reversed and the cause remanded with instructions to the district judge to proceed further in accordance with the opinion of this court.

Respectfully submitted,

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FULTON W. HOGE,

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